Filed 5/10/19 P. v. Sanders CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TROY CEBRAN SANDERS, Defendant and Appellant.	A147611 (Contra Costa County Super. Ct. No. 05-140820-2)

Defendant Troy Cebran Sanders was tried before a jury on an amended information charging 13 offenses, including three counts of attempted murder occurring on three different occasions. He was found not guilty of the more serious offenses but convicted of five offenses resulting in a 13-year prison sentence. He challenges those convictions on several grounds, none of which has merit. He also seeks resentencing to correct fines that were imposed in excess of the statutory maximum and to permit the court to exercise its recently granted discretion to strike a 10-year sentencing enhancement. We shall reduce the fines imposed but otherwise affirm the judgment.

Factual and Procedural Background

The offenses for which defendant was convicted are the unlawful possession of a firearm (Pen. Code,[1] § 29800, subd. (a)(1)) occurring on April 10, 2013; assault of Jashmir Pal with a firearm (§ 245, subd. (a)(2)), discharge of a firearm at an occupied motor vehicle (§ 246) and unlawful possession of a firearm (§ 29800, subd. (a)(1)) all

[1] All statutory references are to the Penal Code unless otherwise noted.

occurring on May 8, 2013; and a third count of possession of a firearm (§ 29800, subd. (a)(1)) occurring on May 15, 2013. The jury also found true the allegation that defendant personally used a firearm (§ 12022.5, subd. (a)) in connection with the May 8 assault. The information also alleged and the court found true that defendant had served a prior prison sentence (§ 667.5, subd. (b)).

The following evidence was presented at trial:[2]

Defendant and Jashmir Pal lived together for five years until their relationship ended in October 2012. After that relationship ended, Pal began dating then later married Lawrence Westbrook. Prior to dating Pal, defendant had a relationship with Westbrook's ex-wife, with whom both defendant and Westbrook have children. Westbrook was in prison on assault charges from 2001 until August 2012. Defendant testified that Westbrook did not like defendant having a relationship with Westbrook's children and that Westbrook had repeatedly threatened that defendant "would be dealt with" when he was released from prison.

The April 10 Incident

Just after 7:00 p.m. on April 10, 2013, Pal's vehicle was stopped for a red light at an intersection in Pittsburg when she noticed a black Firebird stopped ahead of her. While Pal was still stopped, defendant got out of the Firebird and shot at her. Pal ducked, put her vehicle in reverse, and "stomped" on the gas. The vehicle hit the center island, rolled over three times, and came to rest upside down. Pal got out of the car and ran.

Defendant testified that he bought two firearms in March 2013 to protect himself from Westbrook, who had been threatening him. He testified that when Pal's vehicle pulled up behind his car, he saw Westbrook stick a gun outside the passenger side window and fire two shots at his car. In response, he shot back approximately 12 to 14 times in self-defense.

[2] We limit our recitation of the evidence to that relevant to the charges for which defendant was convicted.

Police recovered 14 nine-millimeter shell casings at the intersection. They also found eleven .40-caliber shell casings farther back from the intersection, and an another .40-caliber shell casing approximately four feet from the passenger side of Pal's overturned vehicle.

The May 8 Incident

On the afternoon of May 8, 2013, Pal testified that she alone was sitting in the passenger seat of a red pickup truck parked outside the home of Westbrook's cousin in Pittsburg. Westbrook and several other people were socializing outside the house. Defendant drove past the house in a brown Suburban waving a black handgun and smirking at her. As he continued to drive down the street, he turned in her direction and shot at her. Pal dropped to the floorboard for cover.

Defendant testified that he was driving to a friend's house when he came upon the red pick-up truck. He did not see Pal but saw Westbrook standing by the open door. According to defendant, Westbrook jumped into the truck and fired three shots at him. Defendant returned fire on the truck while attempting to drive away.

Police officers recovered six .40-caliber shell casings in the center of the street that were determined to have been expelled from a firearm recovered from defendant's vehicle a week later.

The May 15 Incident

At 9:15 p.m. on May 15, 2013, a Contra Costa County sheriff's deputy initiated a traffic stop of defendant's car. Defendant consented to a search of his vehicle, during which the deputy found a black, semiautomatic firearm on the floorboard near the driver's seat.

Defendant was sentenced to a term of 13 years in prison. The court imposed the midterm of three years on the May 8 assault conviction plus 10 years for the firearm enhancement. Concurrent terms were imposed on the remaining counts. Defendant timely filed a notice of appeal.

Discussion

1. *Assault with a Firearm (May 8)*

Defendant asserts three related grounds for reversal of his assault conviction: the prosecutor assertedly violated defendant's right to due process and a fair trial when he told the jury that it could convict defendant of assaulting either Westbrook or Pal, since he was charged with assaulting only Pal, and the trial court erred in refusing to amend the verdict form to state that Pal was the alleged victim of the assault and in failing to give a unanimity instruction as to the victim of the assault. We find no error.

At the start of the trial, the jury was read the charges against defendant, including count ten which charged defendant with committing assault with a firearm on May 8 upon the person of Jashmir Pal.[3] The jury was instructed that to find defendant guilty of this charge the prosecution was required to prove "One, the defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a person. Two, the defendant did that act willfully. Three, when the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone. And four, when the defendant acted, he had the present ability to apply force with a firearm to a person. And five, the defendant did not act in self-defense." The instruction further advised that the prosecution was "not required to prove that the defendant actually intended to use force against someone when he acted." The verdict form did not identify a victim by name. The verdict form read, "We, the jury in this case, find defendant . . . guilty of (ASSAULT WITH A FIREARM), a violation of Penal Code section 245(a)(2), a felony, on or about May 8, 2013, as set forth in Count Ten of the Information."

In closing argument, the prosecutor read the elements of the crime of assault with a firearm, then argued, "But what does it look like in real life? If you go through those instructions, what's not required is that the defendant actually strike a human being. . . .

[3] Pal was named as the victim of all offenses for which a victim was named in the information. Westbrook was not identified as a victim in any charge.

[¶] And that's because when we talk about somebody, the criminality that's associated with assault with a firearm, that's [when] you have two guys, one of whom rolls by like you have here, pulls the trigger, boom-boom-boom-boom-boom, committing a drive-by shooting just like defendant did. . . . [¶] . . . Even if nobody is hit, but you have a human being who is in the area and is in such a place where that action could directly and probably result in the application of force to a person, meaning that somebody could be hit with a bullet." The prosecutor explained that Pal was the person who could have been hit by the bullets defendant fired on May 8.

Defense counsel's closing argument focused almost exclusively on the attempted murder charges and did not separately address the assault counts. Counsel argued that, contrary to her testimony, Pal "was never even in the truck on the May 8th incident." He cited the testimony of two neighbors, one who could not tell if it was a man or woman in the truck and the other who told officers he thought it was a man. Counsel argued that defendant had testified he saw Westbrook get in the truck. Then defense counsel argued, "You remember that information that you read, or [was] read to you . . . ? Take a look at that information. Does that information say, trying to kill [Pal] and [Westbrook]? No. . . . Ask for the information. . . . [¶] He was not charged with trying to kill Mr. Westbrook."

In rebuttal, the prosecutor disputed defense counsel's claim that Pal was not in the truck on May 8, citing Pal's testimony and other evidence to the contrary. The prosecutor also pointed out that even if defendant thought he was shooting at Westbrook, Pal was "there too. She's caught in the cross-fire."

At no point did the prosecutor argue to the jury that it could convict defendant under count ten based on finding that he committed an assault on Westbrook. Defendant contends that because the prosecutor argued that the same conduct established both the attempted murder of Pal and the assault with a firearm, and also argued that even if defendant had intended to kill Westbrook he could be found liable for the attempted murder of Pal under the kill zone theory of liability, by implication the prosecutor told the jury it could convict defendant of an assault on Westbrook. Defendant also refers to the prosecutor's arguments that "[b]y virtue of it being attempted murder, by virtue of a

bullet getting that close to the woman's head, that's assault with a firearm. The exact same conduct . . . proves up both crimes," and that "[t]he defense is going to say, well, he was trying to kill Lawrence Westbrook. . . . But the upshot of it is no, no, no, no, he was trying to kill Jashmir Pal *and* Lawrence Westbrook if he was there." Defendant's strained reading of the closing argument is not persuasive. By no stretch of the imagination could the jury have understood these or any other of the prosecutor's statements to mean that it could convict defendant under count ten for assaulting Westbrook rather than for assaulting Pal. Moreover, as indicated above, defendant was explicitly charged in the information read to the jury with assaulting Pal, and there is no disagreement but that the jury was properly instructed on that charge. Although the verdict form did not name Pal, there is no requirement that the verdict form include the name of the victim, and there is no reason to believe the jury was confused as to whom defendant was charged with assaulting.[4] Furthermore, since defendant was charged with assaulting only Pal, and the prosecutor argued only that she was the victim of the assault, there was no need for a unanimity instruction and the court did not err in failing to give one.

2. *Discharging a Firearm at an Occupied Motor Vehicle*

The trial court instructed the jury regarding the offense of discharging a firearm at an occupied motor vehicle in relevant part as follows: "The defendant is charged in counts 3, 7 and 11 with shooting at a car in violation of Penal Code section 246. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant willfully and maliciously shot a firearm; [¶] AND [¶] 2. The defendant shot the firearm at a car; [¶] AND [¶] 3. The defendant did not act in self-defense." Defendant argues that the court's instruction omitted the requirement that the motor vehicle be occupied. The Attorney General acknowledges that this element should have been included in the instruction but asserts that the omission was harmless because the evidence that Pal was in the truck, coupled with the jury's verdict on the assault charge,

[4] Defendant's reference to the prosecutor's argument to the trial judge that it was unnecessary to include Pal's name in the verdict form does nothing to suggest jury confusion since the argument was not made to the jury.

demonstrates that the jury necessarily found that the vehicle was occupied. We agree. Moreover, even the conflicting evidence to which defendant points indicates that someone, even if not Pal, was in the truck when defendant fired at it.[5] Accordingly, the erroneous omission in the instruction was not prejudicial.

3. *Restitution and Parole Revocation Fines*

The trial court imposed a $18,200 restitution fine under section 1202.4, subdivision (b) and a parole revocation fine in the same amount under section 1202.45.[6] Defendant contends, and the Attorney General agrees, that the amount of the fines exceeds the statutory maximum of $10,000. Defendant argues that the fines must be vacated and the matter remanded for a new hearing. However, as the Attorney General argues, there is no need for a remand since we may simply reduce each fine to $10,000, which we shall do. Since the trial court imposed fines that exceeded the maximum, there is no reason to suppose that it would impose less than the maximum if the matter were remanded.[7]

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[5] While defendant's gunfire also hit two other cars parked nearby, there is no likelihood that the jury convicted defendant based on his shooting at a one of the parked cars. All of the evidence and the argument focused on shooting at the truck.

[6] Section 1202.4, subdivision (b) reads in relevant part: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than three hundred dollars ($300) and not more than ten thousand dollars ($10,000). . . . [¶] (2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." Section 1202.45, subdivision (a) reads "In every case where a person is convicted of a crime and his or her sentence includes a period of parole, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4."

[7] Defendant has not filed a supplemental brief challenging the amount of the fines under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 for failure to have established defendant's

4. *Firearm Enhancement*

Finally, defendant contends the matter should be remanded so that the trial court may exercise the discretion that it now has but did not have at the time of sentencing to strike the firearm enhancement. Effective January 1, 2018, section 12022.5 was amended to give trial courts the authority to dismiss or strike section 12022.5 allegations or findings. (Stats. 2017, ch. 682, § 1; Gov. Code, § 9600, subd. (a).) Section 12022.5, subdivision (c) now provides, "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." The Attorney General agrees that because defendant's sentence was enhanced under section 12022.5 and the judgment against him is not yet final, the amendment applies to him retroactively. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) The Attorney General argues, however, that remand and resentencing is not required in this case because the record makes clear that the trial court would not exercise its discretion under section 1385 to strike the enhancement. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

The enhancement was imposed under section 12022.5, subdivision (a), which, though formerly mandatory, provided the court with a triad of additional prison terms from which to choose. (§ 12022.5, subd. (a) ["Except as provided in subdivision (b), any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense."].) Here, the court chose to impose the upper term. When sentencing appellant on the firearm enhancement, the trial court stated: "It seems to me that both probation and the People, in

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ability to pay the fines. We note that defendant's failure to object to the amount of the fines above the $300 minimum on this ground—which ground was clearly available at the time of sentencing—waived any such objection. (See § 1202.4, subd. (c) [authorizing an objection based on an inability to pay when the court imposes a restitution fine in excess of the minimum fine]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126.)

my view, set forth the seriousness of this crime, and those are the reasons which I think the court is driven by virtue of the law to select the aggravated term of ten years. [¶] This crime did involve great violence. The threat of great bodily harm was high, and it definitely disclosed a high degree of viciousness, callousness, and disregard for the possibility of loss of life; not just of Mr. Westbrook who was according to the defendant in the vicinity, but of residents in that area. [¶] The defendant was armed and used the weapon at the time of the commission of the crime. And in my view, the crime was carried out, indicating planning and sophistication, because just a short time before this there was the incident that occurred at the stop—at the stop sign for which the defendant was acquitted of the attempted murder count. [¶] Having had that incident, going anywhere near Mr. Westbrook's home, or Mr. Westbrook's brother's home, or Mr. Westbrook's relative's home would, in my view, be only—the only reasonable interpretation of that would be to indicate planning and a follow-up on a prior incident. [¶] The defendant's testimony supports this, and the defendant testified about this code of silence that he is required to follow, failing which, he himself is in jeopardy, and so he made a choice that, in my view, drives the court to select the aggravated term." The fact that the court did not select a lesser term and its remarks show that it certainly would not exercise its discretion to strike the firearm enhancement altogether. "Under the circumstances, no purpose would be served in remanding for reconsideration." (*People v. Gutierrez, supra*, 48 Cal.App.4th at p. 1896.)

Disposition

The fines imposed under Penal Code sections 1202.4, subdivision (b) and 1202.45, subdivision (a) are reduced to $10,000 each. The judgment is affirmed in all other respects.

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POLLAK, P. J.

WE CONCUR:

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STREETER, J.

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TUCHER, J.